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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RENE CASTRO et al.,

Plaintiffs and Appellants,

v.

GRANT E. BEUCHEL,

Defendant and Respondent.

B204036

(Los Angeles County  
Super. Ct. No. MC016252)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Carlos Baker, Judge. Affirmed.

Law Offices of Bradley H. Spear and Bradley H. Spear, for Plaintiffs and Appellants Rene Castro and Dora Castro.

Law Offices of Joseph D. Tuchmayer and Joseph D. Tuchmayer for Defendant and Respondent Grant E. Beuchel.

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Plaintiffs Rene and Dora Castro appeal from an adverse judgment in their action for breach of contract, fraud, negligent misrepresentation, failure to disclose, and unjust enrichment arising out of a failed escrow. They contend the trial court erred in granting the defendants' motion for judgment notwithstanding the verdict. We affirm because the Castros have provided an inadequate record to permit review.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY<sup>1</sup>**

We summarize the facts on the incomplete record as follows:

On April 22, 2004, the Castros orally agreed to purchase Beuchel's home for \$240,000. The parties also orally agreed to a seven-day escrow, with the home sold in an "as-is" condition. The Castros made a \$2,000 deposit. Beuchel represented that his title was good and clear.

On May 10, 2004, Beuchel gave the Castros the keys to the home and permitted them to enter and commence improvements. The Castros contended they made improvements and purchased appliances which could not be returned.

In late May or early June 2004, the Castros learned there was a lis pendens on the property.<sup>2</sup> The Castros contacted their mortgage company and were advised that they could not obtain financing because of the lis pendens.

Beuchel claimed he did not know about the lis pendens until June 2, 2004.<sup>3</sup> The Castros agreed to a short extension of three months on the escrow, and agreed to rent the house from Beuchel while he cleared the lis pendens. The Castros proposed that, if they determined it was taking too long for Beuchel to clear up the title problem, they could cancel the escrow and be reimbursed for their actual costs incurred in repairing the house,

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<sup>1</sup> The record does not contain an entire reporter's transcript, but omits portions of the testimony.

<sup>2</sup> The lis pendens is not part of the record, but testimony at trial establishes it was recorded March 22, 2004.

<sup>3</sup> Beuchel may have learned of the lis pendens in mid-May 2004 when he received a preliminary title report dated April 23, 2004 that reflected its existence.

including a refund of their deposit. Beuchel immediately rejected this proposal, and stated that he considered the escrow to be cancelled due to impossibility. He asked the Castros to forward their improvement costs for his review.

On June 28, 2004, Beuchel wrote to Robert Penrose, the Castros' real estate agent, advising him he was moving to expunge the lis pendens and enclosing a check for \$5,000 for any repairs the Castros had made to the house, to be cashed in the event they decided not to complete the purchase. Beuchel stated, "this figure is not a starting point for negotiations. Either accept the check or sue me." On July 19, 2004, Beuchel wrote to Penrose to inform him that "all offers to sell the Lancaster property to Mr. Castro are revoked for lack of acceptance. Also, if [Mr. Castro] does not cash the \$5000 check, I will put a stop payment on the same."

The Castros contended that they could not complete the sale because they could not obtain financing until August 30, 2004. Apparently, the lis pendens was expunged August 30, 2004,<sup>4</sup> and although the Castros appeared at the expungement hearing, they denied knowing the lis pendens had been expunged. They denied terminating the escrow, or telling Beuchel they did not want to go through with the sale; instead, they believed instead Beuchel terminated the deal.

The jury found for the Castros on the first (breach of contract), third (negligent misrepresentation) and fifth (unjust enrichment) causes of action, and for Beuchel on the second (fraud) and fourth (failure to disclose) causes of action.

After trial, Beuchel moved for judgment notwithstanding the verdict or in the alternative for other relief on the first, third, and fifth causes of action. The court granted the motion,<sup>5</sup> finding that: the parties were in an escrow for the sale of the property which was scheduled to close June 1, 2004; during the escrow, the parties discovered the lis pendens recorded in March 2004; the parties attempted to negotiate a solution to the problem pending the clearing of title; Beuchel was able to obtain clear title by August 30,

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<sup>4</sup> The record contains no reference to the date the lis pendens was expunged. The statement of decision refers to a date of August 30, 2004.

<sup>5</sup> The record does not contain a transcript of the hearing.

2004,<sup>6</sup> and that such time was reasonable; as a result, the escrow remained open until October 2004 for the Castros, if they wanted to purchase the property at the agreed price of \$240,000; the Castros took no action to close the sale; Beuchel cancelled the escrow a reasonable time after the Castros failed to consummate the sale, and he was not bound to hold the escrow open indefinitely; Beuchel was not in breach because he took reasonable steps to clear title when he discovered the lis pendens; and Beuchel was not guilty of fraud or misrepresentation. The court vacated the judgment, found the reasonable value of the improvements totaled \$5,000, and found that Beuchel was not unjustly enriched because he had tendered a \$5,000 check to the Castros.

## **DISCUSSION**

### **THE RECORD IS INADEQUATE TO PERMIT REVIEW**

The Castros contend that substantial evidence does not support the trial court's grant of Beuchel's motion for judgment notwithstanding the verdict on the first, third and fifth causes of action for breach of contract, negligent misrepresentation, and unjust enrichment. Beuchel argues that the record omits significant portions of the oral testimony given at trial, while including other portions that are favorable to the Castros' case, and that we should affirm the judgment as a matter of law based upon the inadequate record. The Castros essentially contend Beuchel waived the issue by failing to counter-designate the omitted portions of the record.

A motion for judgment notwithstanding the verdict is properly granted only where, viewed in the light most favorable to the party securing the verdict, there is no substantial evidence to support the verdict. (*Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 284.) “‘If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.’ [Citation.]” (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878.)

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<sup>6</sup> The partial record omits any reference to the expungement hearings or the date of the expungement.

In measuring the sufficiency of the evidence, we must review the entire record; we cannot limit our review to isolated pieces of the evidence. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 50.) Crucial to our substantial evidence review is an adequate record. We presume the judgment is correct, and a party challenging a judgment must provide an adequate record to permit us to determine whether the trial court erred in granting a motion for judgment notwithstanding the verdict. (*Vo v. Las Virgenes Municipal Water District* (2000) 79 Cal.App.4th 440, 447.) Where the record omits portions of the transcript, we cannot find error on such a silent record, and therefore will infer substantial evidence supports the trial court's conclusions. (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.)

Generally, the complete absence of a transcript of the oral proceedings precludes a party from challenging the sufficiency of the evidence. (*Barak v. The Quisenberry Law Firm* (2004) 135 Cal.App.4th 654, 660.) However, an appellant may designate less than all of the transcripts of oral proceedings, but the designation notice must state all of the points to be raised on appeal. (Cal. Rules of Court, rule 8.130(a)(2).<sup>7</sup>) By doing so, the respondent may determine whether additional portions of the record should be transcribed and file a counter-designation. (Cal. Rules of Court, rule 8.130(a)(3)<sup>8</sup>; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 497.) The designation limits the scope of review to those items specified, unless otherwise permitted on motion to the appellate court. (*Id.* at p. 497.)

Here, the record is inadequate to permit review because Castros have omitted substantial portions of the trial testimony that appear to be unfavorable to their case. As

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<sup>7</sup> California Rules of Court, rule 8.130(a)(2) provides, "If the appellant designates less than all the testimony, the notice must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise."

<sup>8</sup> California Rules of Court, rule 8.130(a)(3) provides, "If the appellant serves and files a notice designating a reporter's transcript, the respondent may, within 10 days after such service, serve and file a notice in superior court designating any additional proceedings the respondent wants included in the transcript."

Beuchel points out, this omitted testimony includes, but is not limited to: Annette Garcia, the escrow agent who informed the parties of the lis pendens; the testimony of the Castros' real estate expert who testified on value; and the witness who established Rene Castro had actual knowledge that the lis pendens had been expunged. The Castros' knowledge of whether the lis pendens was expunged or when Beuchel discovered it was critical to a determination of whether either party breached the contract and whether Beuchel was negligent in representing the state of title. Beuchel's testimony as well as the documentary evidence established the parties modified the terms of the original agreements (sales and escrow) several times due to the lis pendens, and the incomplete record does not permit us to evaluate the evidence on these issues. In addition, the statement of decision indicates that the trial court in making its findings was relying on expungement of the lis pendens on or about August 30, 2004. This date is relevant to the parties' conduct with respect to the escrow extensions and whether Beuchel was in breach by failing to timely deliver clean title. The record contains no evidence on this issue. Finally, with respect to the Castros' claim for unjust enrichment regarding the improvements they made to the house, although Beuchel points to no portion of the omitted record considering this issue, we nonetheless cannot find the trial court erred without a complete record.

Furthermore, the matter is not waived by Beuchel's failure to file a counter-designation as the Castros argue. The burden is not on the respondent to provide an adequate record for review; rather, that burden rests with the Castros.

### **DISPOSITION**

The judgment of the superior court is affirmed. Respondent is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.